Supreme Court, U.S.
FILED
061422 APR 13 2007
OFFICE OF THE CLERK

No. 06-

IN THE

Supreme Court of the United States

MARCUS MAYHEW CURRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROMALLUS O. MURPHY
Attorney for Petitioner
P. O. Box 20383
Greensboro, NC 27420-0383
(336) 273-1698

QUESTION PRESENTED

WHETHER DEFENDANT'S PRIOR CONVICTION FOR SIMPLE POSSESSION OF COCAINE WAS A "FELONY DRUG OFFENSE" WITHIN THE MEANING OF 21 U.S.C. §§802(44), 841(B)(1)(CA) AND §851, AND THUS WHETHER DEFENDANT WAS SUBJECT TO MANDATORY LIFE IMPRISONMENT ON COUNT 5.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	ii
Table of Appendices	iii
Petition for Writ of Certiorari	1
Opinion Below	1
Jurisdiction	1
Statement of the Case	1
Reasons for Granting the Writ	6
Conclusion	8

TABLE OF CITED AUTHORITIES

	Page
Cases:	
Apprendi v. New Jersey 530 U.S. 466, 120 S.Ct. 2348	7
Blakely v. Washington, 124 S.Ct. 2531, 2537 (2004)	7
State v. Allen, *359 N.C. 425, 615 S.E2d 256 (2005)*	7
United States v. Harp, 406 F.3d 242 (4th Cir. 2005)	6
United States v. Thomas, 447 F.3d 1191	6
Statutes:	
21 U.S.C. §802(44)	6
21 U.S.C. §841(b)(1)(a)	6
21 U.S.C. §851	6
28 U.S.C. §1254(1)	1
N.C.G.S. §90-95(a)(3), (d)(2)	7
N.C.G.S. §15A-1340.17(c)	7

TABLE OF APPENDICES

Page

Appendix A – Per Curiam Opinion of the United States Court of Appeals for the Fourth Circuit Decided January 16, 2007 ..... 1a

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Marcus Mayhew Curry, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The Court of Appeals entered an unpublished memorandum decision that is attached.

JURISDICTION

The judgment of the Court of Appeals was entered on January 16, 2007. The Court has jurisdiction under 28 U.S.C. §1254(1) of Title 29, United States Code.

STATEMENT OF THE CASE

Procedural History

On September 27, 2005, a Grand Jury in the Middle District of North Carolina returned a Ten-Count Superseding Indictment against Marcus Mayhew Curry. Count One charged that on or about December 2004, until on or about January 7, 2005, the exact date to the Grand Jurors unknown, in the County of Davidson, in the Middle District of North Carolina, Marcus Mayhew Curry knowingly and intentionally leased, rented, used and maintained a place, that is, 113 Apt. A Melrose Drive, Lexington, North Carolina, permanently and temporarily, for the purpose of manufacturing, distributing and using a controlled substance, that is, cocaine base ("crack"), a Schedule II, controlled substance within the meaning of Title 21, United States

Code, Section 812, in violation of Title 21, United States Code, Section 856(a)(1) and (b).

Count Two charged that on or about January 7, 2005, in the County of Davidson, in the Middle District of North Carolina, Marcus Mayhew Curry willfully, knowingly and intentionally did unlawfully possess with intent to distribute a mixture and substance containing a detectable amount of cocaine base ("crack"), a Schedule II, controlled substance within the meaning of Title 21, United States Code, Section 812, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(C).

Count Three charged that on or about January 7, 2005, in the County of Davidson, in the Middle District of North Carolina, Marcus Mayhew Curry, having been convicted on April 26, 2000, in the Superior Court of Davidson County, Lexington, North Carolina, of a crime punishable by imprisonment for a term exceeding one year, that is, possession of cocaine, knowingly did possess in commerce and affecting commerce a firearm, that is, a Bryco .380 caliber semiautomatic pistol, model 38, serial number 1214513, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

Count Four charged that on or about January 7, 2005, in the County of Davidson, in the Middle District of North Carolina, Marcus Mayhew Curry, in furtherance of drug trafficking crimes for which he could be prosecuted in a court of the United States, that is, maintaining a place for the manufacture, distribution and use of a controlled substance and possessing with intent to distribute a mixture and substance containing a detectable amount of cocaine base ("crack"), in violation of Title 21, United States Code,

Section 856(a)(1) and 841(a)(1), respectively, did knowingly possess a firearm, that is, a Bryco .380 caliber semiautomatic pistol, model 38, serial number 1214513, in violation of Title 18, United States Code, Sections 924(c)(1)(A) (1 and 2).

Count Five charged that on or about May 27, 2005, in the County of Davidson, in the Middle District of North Carolina, Marcus Mayhew Curry willfully, knowingly and intentionally did unlawfully possess with intent to distribute approximately 91.5 grams of a mixture and substance containing a detectable amount of cocaine base ("crack"), a Schedule II, controlled substance within the meaning of Title 21, United States Code, Section 812, in violation of Title 21, United States code, Sections 841(a)(1) and (b)(1)(A).

Count Six charged that on or about September 7, 2005, in the County of Davidson, in the Middle District of North Carolina, Marcus Mayhew Curry knowingly and intentionally leased, rented, used, and maintained a place, that is, 801 Apartment A Peeler Street, Lexington, North Carolina, permanently and temporarily, for the purpose of manufacturing, distributing, and using a controlled substance within the meaning of Title 21, United States Code, Section 812, in violation of Title 21, United States Code, Sections 856(a)(1) and (b), and Title 18, United States Code, Section 2.

Count Seven charged that on or about September 7, 2005, in the County of Davidson, in the Middle District of North Carolina, Marcus Mayhew Curry willfully, knowingly and intentionally did unlawfully possess with intent to distribute approximately 137.2 grams of a mixture and

substance containing a detectable amount of cocaine hydrochloride, a Schedule II, controlled substance within the meaning of Title 21, United States Code, Section 812, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(C).

Count Eight charged that on or about September 7, 2005, in the County of Davidson, in the Middle District of North Carolina, Marcus Mayhew Curry willfully, knowingly and intentionally did unlawfully possess with intent to distribute approximately 36.6 grams of a mixture and substance containing a detectable amount of cocaine base ("crack"), a Schedule II, controlled substance within the meaning of Title 21, United States Code, Section 812, in violation of Title 21, Untied States Code, Sections 841(a)(1) and (b)(1)(B).

Count Nine charged that on or about September 7, 2005, in the County of Davidson, in the Middle District of North Carolina, Marcus Mayhew Curry, having been convicted on April 26, 2000, in the Superior Court of Davidson County, Lexington, North Carolina, of a crime punishable by imprisonment for a term exceeding one year, that is, possession of cocaine, knowingly did possess in commerce and affecting commerce firearms, that is, a Beretta .22 caliber pistol, model 21A, serial number BBS553245U, a Stallard Arms Inc. 9mm pistol, model JS-9MM, serial number 046364, and an Armi Tanfoglio Gluseppe .25 caliber pistol, model GT 27, serial number MK14511, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

Count Ten charged that on or about September 7, 2005, in the County of Davidson, in the Middle District of North Carolina, Marcus Mayhew Curry, in furtherance of drug

trafficking crimes for which he could be prosecuted in a court of the United States, that is, maintaining a place for the manufacture, distribution and use of a controlled substance and possessing with intent to distribute a mixture and substance containing a detectable amount of cocaine base ("crack"), in violation of Title 21, United States Code, Sections 856(a)(1) and 841(a)(1), respectively, did knowingly possess firearms, that is, a Beretta .22 caliber pistol, model 21A, serial number PBS553245U, a Stallard Arms Inc. 9mm pistol, a model JS-9MM, serial number 046364, and an Armi Tangfolio Gluseppe .25 caliber pistol, model GT 27, serial number MK14511, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i), 924(c)(1)(C)(i) and 2.

On December 27, 2005, a Jury found Mr. Curry guilty of all Ten Counts. The Presentence Report was disclosed on February 9, 2006, and revised on March 10, 2006. The defendant filed objections to paragraphs 2, 4, 52 and 86 of the Presentence Report, contending that the June 26, 2000 conviction for felony possession of cocaine is not a "felony drug offense."

Mr. Curry appeared for sentencing on March 24, 2006. The District Court imposed a sentence of life imprisonment plus 30 years. The District Court further ordered that Mr. Curry's active sentence be followed by a term of supervised release of ten years and a special assessment of $1,000. The Appellant filed notice of appeal on April 19, 2006, from the Judgment entered on April 14, 2006. On January 16, 2007 the Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

A compelling reason for granting a petition for writ of certiorari exist when the Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court.

Counsel acknowledges that the United States Court of Appeals for the Fourth Circuit and other Circuits have rejected Appellants' position and held that career offender sentencing guidelines statutory maximum was the maximum terms of imprisonment authorized by the offense of conviction, not the maximum penalty which defendant could receive under the sentencing guidelines, based upon his unique circumstances. United States v. Harp, 406 F.3d 242 (4th Cir.), cert. denied, 126 S.Ct. 297 (2005); United States v. Thomas, 447 F.3d 1191. Nevertheless, it is the Appellant's position that Harp cannot be reconciled with Blakely, and this matter is ripe for the Court's consideration.

Regarding paragraphs 2, 4, 52 and 86 of the Presentence Report, the Defendant advanced the position that the April 26, 2000, conviction in Davidson County Superior court, Docket No. 99CRS15083, for felony possession of cocaine, is not a "felony drug offense" within the meaning of 21 U.S.C. §802(44), and cannot form the basis for a statutory sentence enhancement under 21 U.S.C. §841(b)(1)(a) and 851. A prior drug conviction must have been for an offense "punishable by imprisonment for more than one year" in order to qualify as a "felony drug offense." 21 U.S.C. §802(44) (emphasis added). However, felony possession of cocaine is a Class I felony under North Carolina law, and the maximum penalty for a non-aggregated Class I felony, even for a defendant with the worst criminal history, is 12

months. N.C.G.S. §§90-95(a)(3), (d)(2), 15A-1340.17(c), (d). The defendant was convicted of non-aggravated felony possession of cocaine. Since "the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum sentence he may impose without any additional findings," the "statutory maximum" for Mr. Curry's crime was 12 months. Blakely v. Washington, 124 S.Ct. 2531, 2537 (2004) (emphasis in original). See also, State v. Allen, 359 N.C. 425, 615 S.E. 2d 256 (2005) (applying Blakely to North Carolina's structured sentencing system). Thus, his prior conviction is not a "felony drug offense" as defined by 21 U.S.C. §802(44), and cannot form the basis for a statutory sentence enhancement under 21 U.S.C. §§841(b)(1)(a) and 851. Therefore, the mandatory minimum sentence for Count Five is imprisonment for 20 years, not imprisonment for life. 21 U.S.C. §841(b)(1)(a).

Apprendi held that any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. Apprendi applied that holding in the context of a non-guideline sentencing scheme. Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348. Blakely extended Apprendi to hold that it applies with equal force to a state guidelines sentencing scheme. Blakely v. Washington, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law

makes essential to the punishment," and the judge exceeds his proper authority." Blakely, supra.

In Curry's case, the maximum was one year in the relevant state court conviction. The Court could have given additional time only upon finding additional facts. Punishment in this case is exacting a penalty on Curry that state court proceedings did not find or authorize.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Romallus O. Murphy
Attorney for Petitioner
P. O. Box 20383
Greensboro, NC 27420-0383
(336) 273-1698
(336) 274-7947

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-4429

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

versus

MARCUS MAYHEW CURRY,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. William L. Osteen, Senior District Judge. (1:05-cr-00282-WLO)

Submitted: November 30, 2006 Decided: January 16, 2007

Before TRAXLER, KING, and GREGORY, Circuit Judges

Affirmed by unpublished per curiam opinion.

Romallus O. Murphy, LAW OFFICE OF ROMALLUS O. MURPHY, Greensboro, North Carolina, for Appellant. Kearns Davis, Assistant United States Attorney, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

A jury convicted Marcus Mayhew Curry of drug and firearm offenses: maintaining places at 113 Melrose Drive, Apartment A, and 801 Peeler Street, Apartment A, both in Lexington, North Carolina, for the purpose of distributing crack cocaine (Counts 1 and 6, respectively), in violation of 21 U.S.C.A. §856(a)(1), (b) (West 1999 & Supp. 2006); possession with intent to distribute a mixture containing a detectable amount of crack cocaine, 91.5 grams of crack cocaine, and 39.6 grams of crack cocaine (Counts 2, 5, and 8, respectively), and 137.2 grams of cocaine hydrocholoride (Count 7), in violation of 21 U.S.C. §841(a)(1) (2000); possession of a firearm by a convicted felon (Counts 3 and 9), in violation of 18 U.S.C. §922(g)(1) (2000); and possession of a firearm during and in relation to a drug trafficking crime (Counts 4 and 10), in violation of 18 U.S.C.A. §924(c)(1) (West 2000 & Supp. 2006). The district court sentenced Curry to mandatory life imprisonment after the Government notified Curry pursuant to 21 U.S.C. §851 (2000) of its intent to seek enhanced statutory penalties.

Curry's counsel has filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), questioning (1) whether the evidence as sufficient to convict Curry on Counts 1, 2, and 4, and (2) whether Curry's prior conviction for felony possession of cocaine under North Carolina law qualified as a "felony drug offense" under 21 U.S.C.A. §802(44) (West Supp. 2006), for purposes of applying enhanced statutory penalties. Counsel states, however, that he has found no meritorious grounds for appeal. Curry has filed a pro se supplemental brief. We affirm.

Counsel raises as a potential issue the sufficiency of the evidence on Counts 1, 2, and 4, based upon the small amount of crack and cash seized from Curry's apartment. Our review of the trial transcript convinces us that the evidence was sufficient to convict. See United States v. Smith, 451 F.3d 209, 216 (4th Cir.) (discussing standard of review for denial of motion filed under Fed.R.Crim.P. 29), cert. denied, 127 S.Ct. 197 (2006); see also United States v. Snow, 462 F.3d 55, 70-71 (2d Cir. 2006) (discussing elements of §856 offense); United States v. Collins, 412 F.3d 515, 519 (4th Cir. 2005) (discussing elements of possession with intent to distribute); United States v. Lomax, 293 F.3d 701, 705 (4th Cir. 2002) (discussion §924(c) offense).

Curry also contends on appeal that his North Carolina conviction for felony possession of cocaine did not qualify as a felony drug offense for purposes of applying the enhanced statutory penalties in 21 U.S.C.A. §841(b) (West 1999 & Supp. 2006). Counsel correctly concedes, however, that this claim is foreclosed by our decision in United States v. Harp, 406 F.3d 242, 246 (4th Cir.), cert. denied, 126 S.Ct. 297 (2005).

In accordance with Anders, we have reviewed the entire record for any meritorious issues and have found none. We have carefully reviewed the issues raised in Curry's pro se supplemental brief and find them to be without merit. Accordingly, we affirm Curry's convictions and sentence. This court requires that counsel inform his client, in writing, of his right to petition the Supreme Court of the United States for further review. If the client requests that a petition be filed, but counsel believes that such a petition would be frivolous, then counsel may move

in this court for leave to withdraw from representation. Counsel's motion must state that a copy thereof was served on the client. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED